

ENTERED

March 24, 2023

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

VALENTIN GAONA,	§
	§
Petitioner,	§
	§
VS.	§ CIVIL ACTION NO. 2:21-CV-00266
	§
BOBBY LUMPKIN,	§
	§
Respondent.	§

ORDER ON MEMORANDUM & RECOMMENDATION

Petitioner Valentin Gaona is a state prisoner incarcerated at the Texas Department of Criminal Justice-Criminal Institutions Division (TDCJ) Connally Unit in Kenedy, Texas. D.E. 1. On July 8, 2022, the Court adopted United States Magistrate Judge Julie K. Hampton's Memorandum and Recommendation ("M&R") and dismissed Gaona's 28 U.S.C. § 2254 petition as untimely. D.E. 17; D.E. 19. Gaona subsequently appealed to the Fifth Circuit, which denied his motion for a certificate of appealability. D.E. 34. Gaona then filed a new notice of appeal in an attempt to obtain review of issues that the Fifth Circuit deemed waived. *See* D.E. 34; D.E. 35.

Now pending are Gaona's application to proceed *in forma pauperis* (IFP) on appeal and motion for appointment of counsel (D.E. 36) and motion for reconsideration (D.E. 37). On December 15, 2022, the Magistrate Judge filed an M&R recommending that both

motions be denied. D.E. 38. Gaona has timely filed his objections.¹ D.E. 46. Since that time, the Fifth Circuit has denied Gaona's second attempt to obtain a certificate of appealability to appeal the judgment of this Court, terminating Gaona's attempted appeal. D.E. 49. Consequently, the application to proceed IFP and motion for counsel on appeal (D.E. 36) are **DENIED** as moot. The Court now considers the motion for reconsideration.

First, Gaona objects to the Magistrate Judge's recommendation to deny his motion for reconsideration. The M&R reasoned that this motion should be denied because Gaona failed to address the timeliness of his petition, the issue that originally caused his habeas petition to be dismissed. *See* D.E. 38, p. 4. Gaona now—for the first time in his objections—attempts to address the timeliness issue. The issue was waived as it was not before the Magistrate Judge in his motion for reconsideration. *See* D.E. 37; *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994). Regardless, Gaona's assertion that his claim is subject to equitable tolling under *Holland v. Florida*, 560 U.S. 631 (2010), was previously analyzed by the Magistrate Judge, who recommended that this claim be rejected. *See* D.E. 17, pp. 6-8. This Court then adopted that recommendation. D.E. 19. The Court therefore **OVERRULES** Gaona's first objection.

Second, Gaona attempts to reach the merits of his underlying habeas claim by citing *Schlup v. Delo*, 513 U.S. 298 (1995), and arguing that there is new evidence of his

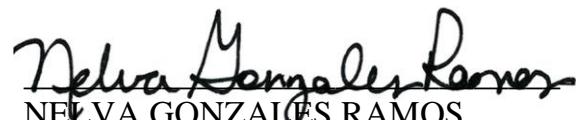
¹ Gaona also filed a document that the Magistrate Judge construed as additional objections to the M&R as well as a motion for an evidentiary hearing. D.E. 47. The Magistrate Judge denied the motion for the evidentiary hearing. D.E. 48. This filing does not contain proper objections to the M&R; Gaona simply rehashes merits arguments previously addressed by this Court. To the extent that D.E. 47 contains objections to the M&R, they are therefore **OVERRULED**.

innocence. D.E. 46, p. 2. This objection repeats arguments regarding actual innocence that this Court found were conclusory and does not address the most recent findings of the Magistrate Judge. *See* D.E. 19, p. 2; D.E. 38, pp. 3-4. This objection is therefore improper and **OVERRULED**. *See Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003).

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge's Memorandum and Recommendation, as well as Gaona's objections, and all other relevant documents in the record, and having made a de novo disposition of the portions of the Magistrate Judge's Memorandum and Recommendation to which objections were specifically directed, the Court **DENIES** the application to proceed IFP and motion for appointment of counsel (D.E. 36) as moot, **OVERRULES** Gaona's objections as to the analysis on his motion for reconsideration (D.E. 37), and **ADOPTS** as its own the findings and conclusions of the Magistrate Judge with respect to the motion for reconsideration. Accordingly,

- 1) Gaona's application to proceed *in forma pauperis* on appeal and motion for appointment of counsel (D.E. 36) are **DENIED**; and
- 2) Gaona's motion for reconsideration (D.E. 37) is **DENIED**.

ORDERED on March 24, 2023.


NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE